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IN THE

Supreme Court of the United States

October Term, 1966

No. 361

VIRGIL NINNEMAN, PETITIONER

vs.

STATE OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

Virgil Ninneman, your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska entered on February 11, 1966.

OPINION BELOW

The opinion of the Supreme Court of Nebraska (Appendix B, infra pp. 12-19) is reported in 179 Neb. 729, 140 N. W. 2d 5. The District Court of Lancaster County, Nebraska rendered no opinion upon the entering of judgment in the case.

JURISDICTION

The judgment of the Supreme Court of Nebraska was

entered on February 11, 1966 (infra Appendix B. pp. 12-19. A timely petition for rehearing was denied on April 22, 1966. The jurisdiction of this court is invoked under 28 U. S. Code, § 1256 (3), since the judgment of the Supreme Court of Nebraska has infringed rights, privileges and immunities especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Where denial of counsel in a criminal proceeding is alleged by the defendant and where the record of such proceeding does not affirmatively show a waiver of the right to counsel, is the burden on the defendant to prove denial of counsel by "clear and convincing evidence"?

2. In a misdemeanor prosecution where, under the state's multiple-offender statute, a later felony prosecution may be based in part on the conviction of the misdemeanor, is the accused constitutionally entitled to counsel?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are set forth in Appendix A, infra. The Sixth Amendment to the Constitution of the United States. Section 39-727, Nebraska Revised Statutes 1943. Section 29-102, Nebraska Revised Statutes 1943.

STATEMENT OF THE CASE

This case originated upon the filing of a complaint against the defendant charging him with operating a motor vehicle under the influence of alcoholic liquor (second offense). (R.3). A plea of "not guilty" was entered. (R.4). Upon trial in the Municipal Court the de-

fendant changed his plea from "not guilty" to "nolo contendere" upon which plea he was found guilty and appealed. (R.5). On appeal, jury trial was had upon a plea of "not guilty". (R.7). The petitioner was found guilty. (R.9).

On December 21, 1964, a hearing was held to determine whether this conviction constituted a second offense. (R.11). This hearing was limited to proof of the prior conviction. At this hearing the petitioner testified as to his repeated requests to be allowed to call his attorney after his arrest for the prior offense and he testified as to the continued denial of these repeated requests by the state officials. (R.24-29). No evidence whatsoever was presented by the state to show that petitioner had waived his right to counsel. The records of the prior conviction did not show that defendant either had counsel or that he had waived the right to counsel. (R.37-40). At the end of the hearing the trial judge ruled that the prior conviction was proved and found the petitioner guilty of driving a motor vehicle while under the influence of intoxicating liquor (second offense). (R.15). No finding whatsoever was made by the trial court that petitioner either had counsel at his prior trial, or that he had waived it.

The Supreme Court of Nebraska affirmed, saying that although petitioner had the constitutional right to counsel as he alleged, he had the burden to prove denial of counsel by "clear and convincing evidence." (R.46).

HOW THE FEDERAL QUESTION WAS RAISED

At the hearing on December 21, 1964 to determine the validity of the alleged prior conviction the defendant testified to the facts surrounding the first conviction which showed a denial of the right to counsel. The prosecuting

attorney objected to such testimony as being irrelevant and immaterial. Counsel for the defendant thereupon stated to the court that it was their contention that denial of counsel in the prior proceeding would be a complete bar to using such a conviction as a basis for an increased sentence under a multiple-offender statute. (R.24).

REASONS FOR GRANTING THE WRIT

The decision of the Nebraska Supreme Court in this case is clearly in conflict with decisions of this court. This Court held in *Carnley v. Cochran,* 369 U. S. 506, that where a dispute arises as to whether the defendant was afforded his right to counsel, a hearing must be held to resolve the issue and the burden is on the state to prove either that defendant had counsel or that he had waived it. There was to be no "presumption of waiver" of this most basic right:

> "In Moore (*Moore v. Michigan,* 355 U. S. 155), the record showed clearly that the petitioner had expressly declined an offer of counsel by the trial judge, and we held that the accused had to show by a preponderance of the evidence that his acquiescence was not sufficiently understanding and intelligent to amount to an effective waiver. But no such burden can be imposed upon an accused unless the record—or a hearing, where required—reveals his affirmative acquiescence where, as in this case, the constitutional infirmity of trial without counsel is manifest, and there is not even an allegation, much less a showing of affirmative waiver, the accused is entitled to relief from his unconstitutional conviction." (369 U. S. 516-17)

In *Rice v. Olson,* 324 U. S. 786, this Court held that even a guilty plea was not necessarily to be considered a waiver. To so hold this Court said would be:

> "The equivalent of holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid." 324 U. S. at 788

In the instant case the petitioner raised the issue of denial of counsel. (Appendix B pp. 12-19). The state neither introduced evidence contradicting this testimony nor did it show by official records that petitioner either had counsel or had waived counsel at the time of this prior conviction. In spite of the undisputed evidence of denial of counsel in this case the court below held that it was petitioner's duty to prove denial of counsel "by clear and convincing evidence."

The practical impossibility of fulfilling such a burden is amply illustrated by the facts of this case. Petitioner's evidence of denial of counsel was never disputed by the prosecution. Petitioner was not even cross-examined as to these allegations. Perhaps the most striking evidence supporting petitioner's allegations is the undisputed record that the time from the initial arrest of petitioner through the execution of his sentence was less than ten hours during all of which time he was in police custody. (Appendix B, pp. 12-19).

Petitioner's need for the assistance of counsel at that time is shown by the recognition of the court below of a valid defense available to him, which the court held had been waived through failure to assert. The Nebraska Supreme Court said:

> "There is little question on the record that the procedure adopted was irregular and was subject to a proper objection. If a plea in abatement had been filed it would undoubtedly have been necessary to

> file an amended complaint. However, the appellant, by pleading guilty to the complaint, must be held to have waived any objection to it which could have been asserted by a motion to quash or a plea in abatement." (Appendix B, infra pp. 12-19).

It is submitted that the decision of the Nebraska Court in this case contravenes the constitutional standard set by this Court for the determination of assertions of denial of counsel. The practical effect of this case is to reverse the well-established constitutional presumption against waivers of fundamental rights. It is an impediment in the future administration of justice because it places an impossible burden of proof on defendants asserting denial of their right to counsel.

It will be noted that the decision of the court below not only places the burden on the petitioner to prove denial of counsel, but holds that he must satisfy that burden by "clear and convincing evidence." This requirement places on a criminal defendant a much heavier burden of proving that he was denied counsel than if he had to satisfy the normal requirement of proof by the "preponderance of the evidence." In Nebraska, as elsewhere, proof by "clear and convincing evidence" requires a much higher degree of proof than the ordinary requirement of proof by "preponderance of the evidence." *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N. W. 2d 185. It has been compared to the burden of proving beyond a reasonable doubt required of the state in criminal prosecutions. Black's Law Dictionary, 4th Edition.

A leading text states that the burden of proof by clear and convincing evidence is normally used to overcome an adverse presumption. See, 32A, C. J. S., Evidence, § 1023. This is the rule in Nebraska. *Hein v. W. T. Rawleigh Co.*,

supra. The presumption which the petitioner in this case had to overcome, is of course, the presumption that he had waived his right to counsel at the prior trial. As this court stated very emphatically in *Rice v. Olson*, supra, and in many other decisions, the Sixth Amendment to the Constitution forbids this type of presumption. As this court has pointed out, there is instead a "presumption *against* waiver of fundamental constitutional rights * * *." *Johnson v. Zerbst*, 304 U. S. 458 at 464. (Emphasis added) See also *Carnley v. Cochran*, supra.

The fact that both prosecutions involved herein are misdemeanors rather than felonies is immaterial in determining petitioner's constitutional rights herein.

First, under Nebraska law, the statutory distinction between a misdemeanor and a felony is so arbitrary that it cannot provide a reasonable basis for distinguishing between the constitutional rights available to persons charged with the two classes of crimes. Section 29-102, R. R. S. 1943 provides that a crime in which the punishment may result in a sentence in the state penitentiary shall be a felony and all other crimes shall be misdemeanors. (Appendix A, infra). As this Court has said on numerous occasions the constitutional right to counsel is based on the premise that it is necessary to assure the fairness and integrity of criminal proceedings. The fact that an accused who is convicted may be confined in a penal institution other than the state penitentiary is no reason for withholding from him such a basic right. The chance that he may be the victim of unfair or improper procedures is no less than if he were charged with a felony. In this case the court admitted that there was a fatal defect in the complaint which the petitioner could have successfully asserted. It is important to note that the defect was of such a nature

that only trained counsel would have recognized it.

Secondly, even if it were assumed that a valid distinction could be drawn between the rights available in misdemeanor and felony prosecution, because the convictions herein obtained may be used as the basis for a later felony prosecution under the statute (Section 39-727, R. R. S. 1943, Appendix A, infra), petitioner must be afforded the same rights in the misdemeanor prosecution as he would in a felony prosecution. See, *Danielson v. State,* 155 Neb. 890, 54 N. W. 2d 56. Under the rule announced by this Court in *Hamilton v. Alabama,* 368 U. S. 62, these prior convictions are "critical stages" of the felony prosecution and thus entitle petitioner to counsel at that time. Even more analogous is the case of *White v. Maryland,* 373 U. S. 59, where this Court held an arraignment to be a "critical stage" when the plea there entered by the defendant could be used at this trial.

It is admitted that petitioner is not now facing such a felony prosecution. But in order to protect his right to counsel at all "critical stages" of a future prosecution he must be able to enforce it here. In contrast to the usual situation where counsel has been denied at the "critical stage," petitioner here will suffer a present detriment because of such denial which no future determination of denial can possibly alleviate. Moreover, it would be more difficult at a future date for the petitioner to rebut any evidence of the state tending to show a lack of denial of counsel although such evidence may be presently available.

The court below implies that the petitioner has been negligent in asserting this alleged denial of counsel and has proscrastinated in raising the issue. (Appendix B, infra, pp. 12-19). But petitioner had no way to resolve this

issue before the present proceeding. The concurring opinion suggests that petitioner could have appealed or sought relief by habeas corpus from his first conviction.

An opinion handed down the same day as this case, *Stuckey v. Rohnert,* 179 Neb. 727, 140 N. W. 2d 9, points out the unavailability of habeas corpus in Nebraska to provide the relief here needed.

The suggestion that petitioner should have appealed from his guilty plea presumes that a person in that position would believe that he would have a right to appeal. Moreover, in *Abbott v. State,* 160 Neb. 275, 69 N. W. 2d 878, the Nebraska court in a similar situation where the defendant was found guilty, paid his fine and surrendered his operator's license, held that the satisfaction of judgment by the defendant was a bar to an appeal.

For the reasons enumerated above, petitioner believes the Nebraska Supreme Court decided a substantial federal question in direct conflict with the decision of this court and that the effect of the judgment will work an injustice not only on your petitioner, but on the whole administration of justice by placing a substantial burden on defendants to prove non-waiver of basic and fundamental rights.

Respectfully submitted,

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APPENDIX A

Constitution of the United States, Article VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 39-727 of Nebraska Revised Statutes of 1943 provides:

> 39-727. DRUNKEN DRIVING; PENALTIES; REVOCATION OF OPERATOR'S LICENSE; FORFEITURE OF MOTOR VEHICLE. It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or any drug. Any person who shall operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug shall be deemed guilty of a crime, and upon conviction thereof, shall be punished as follows; (1) If such conviction is for a first offense, such person shall be imprisoned in the county jail for not more than three months, or shall be fined one hundred dollars, or both such a fine and imprisonment, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of six months from the date of his final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later, and shall order that the operator's license of such person be revoked for a like period; (2) if such conviction is for a second offense such person shall be imprisoned in the county jail for not less than five days nor more

than three months and shall be fined three hundred dollars, and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of one year from the date of his final discharge from the county jail, or the date of payment or satisfaction of such fine, whichever is the later, and shall order that the operator's license of such person be revoked for a like period, and if the motor vehicle which such person was operating or was actually physically controlling, while under the influence of alcoholic liquor or any vehicle shall be impounded in a reputable garage by the court for a period of not less than two months nor greater than one year at the expense and risk of the owner thereof; *Provided,* any motor vehicle so impounded shall be released to the holder of a bona fide lien thereon, executed prior to such impounding, when possession of such motor vehicle is requested in writing by such lien-holder for the purpose of foreclosing and satisfying his lien thereon; and (3) if such conviction is for a third offense, or subsequent offense thereafter, such person shall be imprisoned in the penitentiary for not less than one year nor more than three years and the court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for a period of one year from the date of his final discharge from the penitentiary and shall order that the operator's license of such person be revoked for a like period.

Section 29-102 of Nebraska Revised Statutes of 1943 provides:

29-102. FELONY AND MISDEMEANOR, DEFINED. The term felony signifies such an offense as may be punished with death or imprisonment in the Nebraska Penal and Correctional Complex. Any other offense is denominated a misdemeanor.

APPENDIX B

STATE of Nebraska, Appellee,

v.

Virgil NINNEMAN, Appellant.

No. 36106.

Supreme Court of Nebraska.

Feb. 11, 1966.

Syllabus by the Court

1. Proof of prior convictions under section 39-727, R. S. Supp., 1963, is properly made by offering in evidence the complaint or information in the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that the defendant is the same person presently before the court.

2. A plea of guilty to a complaint waives any objection to it which could have been asserted by a motion to quash or a plea in abatement.

3. Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel.

4. The mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts.

5. A plea of guilty by defendant does not necessarily waive his constitutional right to counsel.

6. Any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege.

7. It is not the province of this court in a criminal case to pass on the credibility of witnesses or weigh the evidence unless it is lacking in probative force as a matter of law.

John McArthur, Lincoln, for appellant.

Clarence A. H. Meyer, Atty. Gen., H. G. Hamilton, Asst. Atty. Gen., Lincoln, for appellee.

Heard before WHITE, C. J., and CARTER, SPENCER, BOSLAUGH, BROWER, SMITH, and McCOWN, JJ.

SPENCER, Justice.

Virgil Ninneman, hereinafter referred to as appellant, was found guilty after a jury trial of driving his automobile while under the influence of alcoholic liquor, which for convenience hereinafter will be referred to as drunk driving. Subsequently the court determined that appellant was guilty of drunk driving, second offense, and sentenced him to serve 5 days in the Lancaster County jail, to pay a fine of $300 and the costs of prosecution, and suspended his operator's license for 1 year. This appeal pertains only to the subsequent proceeding involving the proof of appellant's first conviction.

The complaint, the warrant, and the mittimus on the first conviction were received into evidence without objection. The proof made on the first conviction was in strict conformity with the procedure outlined in *Danielson v. State,* 155 Neb. 890, 54 N. W. 2d 56. We there said: "* * * proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court."

Appellant presents two questions by this appeal: (1) Does failure to subscribe and swear to a complaint, as required by law, render subsequent proceedings thereunder void when the defendant pleads guilty to the allegedly defective complaint; and (2) does denial of counsel in a misdemeanor action create an infirmity which the defendant may raise in a subsequent proceeding under a second offense drunk driving prosecution?

[1] Considering the first assignment, appellant's evidence would indicate that the complaint, which was signed by a deputy county attorney, was not sworn to before a judicial officer. There is little question on the record that the procedure adopted was irregular and was subject to a proper objection. If a plea in abatement had been filed, it would undoubtedly have been necessary to file an amended complaint. However, the appellant, by pleading guilty to the complaint, must be held to have waived any objection to it which could have been asserted by a motion to quash or a plea in abatement. Section 29-1812, R. R. S. 1943, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue."

Appellant's second assignment is much more basic. His testimony is that he was arrested by officer Baumhover about 1 a. m., May 4, 1961, for drunk driving, and that when he was arrested he requested permission from Baumhover to use a telephone to contact an attorney and was told, " 'Not tonight.' " He further testified that Baumhover took him to the city jail and that he made the same request of the desk sergeant who checked him into the city jail, and was again refused. It was his testimony that

about 9 a. m. the same morning he was taken from the city jail to the office of the deputy county attoney at the courthouse. On two occasions he requested permission to use a telephone to contact an attorney and the deputy county attorney ignored his request and made no reply thereto. He was asked several questions by the deputy county attorney, who then had him sign a paper. He was taken from the courthouse to the city jail, and then up to the municipal court. His testimony then was as follows: "A—Well, Baumhover took me from the courthouse over to the city jail and up to the courtroom. And I just didn't know what to do; I felt under—I had no other choice but to plead guilty. I didn't feel good; I wanted to get out of there."

Appellant was fined $100 and costs on his plea of guilty, and his operator's license was suspended for a period of 6 months. He delivered his license to the court at that time. A mittimus was issued committing him to jail until the fine and costs were paid. He paid his fine shortly thereafter, and was discharged from custody. Although appellant was without his operator's license for at least the next 6 months, he made no attempt to question the proceeding involved in this first conviction until his conviction on his second offense.

Officer Baumhover was produced as a witness for the State, and denied that he was the officer who arrested the appellant. He testified that he did not see him at all in the early morning hours of May 4, 1961. His contact with the appellant occurred later in the morning. The record indicates he was the offieer who took appellant to the municipal court and who delivered him to the city jail after his plea of guilty.

[2] Appellant's charge of denial of counsel is a serious one, and no court can condone it when it occurs. Defendant in any criminal prosecution must be given a reasonable opportunity to employ and consult with counsel; otherwise the right to be heard by counsel would be of little worth. *Chandler v. Fretag,* 348 U. S. 3, 75 S. Ct. 1, 99 L. Ed. 4. However, after appellant's long procrastination, it is a charge which must be proved by clear and convincing evidence.

On the record presented to this court, there are two grounds on which the trial court may have based its decision: (1) The trial court, considering all of the facts and circumstances, may have decided as a factual matter that the appellant had not been denied counsel; or (2) even if appellant had requested the use of a telephone previous to his court appearance, he effectively waived his right to counsel by his plea.

[3] Appellant's testimony is not entirely uncontested as he suggests in his brief. It is true he could have been mistaken or confused in the identity of the officer involved in his testimony as it concerned Baumhover. It is possible that he could be equally mistaken on some of his other testimony. It does test credulity to believe that a person of appellant's intelligence would answer questions and "sign a paper" for the deputy county attorney if he could not get an answer to his own question. In any event, the mere fact that testimony is uncontradicted does not mean that it must be accepted as true on the hearing. Credibility is for the triers of the facts. See *Snowardt v. City of Kimball,* 174 Neb. 294, 117 N. W. 2d 543.

[4, 5] By a plea of guilty, a defendant does not necessarily waive his constitutional right to counsel. *Rice v.*

Olson, 324 U. S. 786, 65 S. Ct. 989, 89 L. Ed. 1367. However, any constitutional right or guarantee may be waived although the waiver must be an intelligent relinquishment or abandonment of a known right or privilege. *Fay v. Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837.

[6] We are satisfied that the trial court could have determined that the appellant had sufficient intelligence to know his rights; that he understood the nature of his act; and that his plea of guilty constituted an effective waiver. Appellant was an adult who had at least a high school education. He had served 3 years in the Marine Corps, and has been steadily employed since he left the service. It is hard to understand why a person of appellant's intelligence, if he had made the four requests he testified to for an opportunity to contact counsel, would have failed to have made that fact known to the court at the time of his arraignment on the complaint. Two of the requests are alleged to have been made within a few moments of the time he was taken to court.

[7] The able trial judge who heard the testimony and who had an opportunity to observe the demeanor of the witnesses found against the appellant on the facts. It is not the province of this court in a criminal case to pass on the credibility of witnesses or weigh the evidence unless it is lacking in probative force as a matter of law. *State v. Berg*, 177 Neb. 419, 129 N. W. 2d 117. On the record presented to this court, we cannot say, as a matter of law, that the determination of the trial court is erroneous.

For the reasons given, the judgment of the trial court is affirmed.

Affirmed.

CARTER, Justice (concurring in result).

On May 7, 1965, defendant was sentenced for a second offense of drunken driving. No contention is advanced that the verdict of the jury finding him guilty of drunken driving was in any respect erroneous. The complaint charged this to be a second offense.

In 1961 the defendant was found guilty of drunken driving in the municipal court of the city of Lincoln. The complaint and judgment of the municipal court were received in evidence without objection. That no appeal was taken therefrom, and that the defendant was the same person as the person presently in court was established. This court has held many times as follows: "We reiterate that proof of such convictions is properly made by offering in evidence the complaint or information, the judgment rendered on the verdict or the plea of guilty, evidence that the judgment has become final, and that defendant is the same person presently before the court." *Danielson v. State,* 155 Neb. 890, 54 N. W. 2d 56. The proof was made strictly in accordance with the rule of this court and defendant thereupon became subject to the penalty provision for a second offense for drunken driving, contained in section 39-727, R. S. Supp., 1963.

Defendant contends, however, that he was denied the right to obtain counsel in his first conviction in 1961, and that it was therefore void and not useable to prove that he was subject to the increased penalty for a second violation. The finality of the previous conviction is established. Defendant did not appeal nor seek redress by habeas corpus. In fact, he entered a plea of guilty and satisfied the penalty for the 1961 offense. I submit that under the existing law of this state he may not collaterally attack irregularities

in his first conviction to avoid the increased penalties for the second.

Defendant has been convicted of two drunken driving offenses which have been established in the manner that this court has prescribed. The majority opinion ignores the long-established law of this state and cites no authority for so doing. I disagree with this method of opinion writing. Having these views, I concur in the result but disagree with the basis of the decision.

APPENDIX C

SUPREME COURT OF NEBRASKA

JANUARY TERM, A.D. 1966

February 11, 1966

State of Nebraska,)
Appellee,)
v.)
Virgil Ninneman,)
Appellant,)

Appeal from the District Court for Lancaster County.

No. 36106.

This cause coming on to be heard upon appeal from the district court of Lancaster county was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and it hereby is, affirmed; that appellee recover of and from appellant its costs here-

in expended, taxed at $; for all of which execution is hereby awarded and that a mandate issue accordingly.

JOURNAL ENTRY

That on the 11th day of March, 1965 (that being the 32nd Judicial Day of the January 1965 term of said court) were had and done the following proceedings as appear upon Court Journal "304" at page 620, Honorable Bartlett E. Boyles, Judge to-wit:

The State of Nebraska,	)	
-vs-	)	19-176
Virgil L. Ninneman	)	

Trial of this cause having previously been argued and submitted to the court on second offense, the Court finds that the defendant was properly charged and convicted of prior offense as alleged in the information filed herein and therefore finds the defendant guilty of driving a motor vehicle while under the influence of intoxicating liquor, second offense, as charged.

This cause now comes on to be heard on the motion of the defendant that the verdict of the jury heretofore rendered and entered herein be set aside, and a new trial of this cause be had, and is argued and submitted to the court, on due consideration whereof the court overrules said motion.

Further proceedings herein are suspended pending an investigation of the case by the Adult Probation Officer of the Court.

Present appearance bond is continued in effect.